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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 In re MTBE

00-CV-1898 (SAS)

4 Telephone Conference

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5 New York, N.Y.
6 December 22, 2015
3:06 p.m.

7 Before:

8 HON. SHIRA A. SCHEINDLIN,

9 District Judge

10 APPEARANCES
11 (Via Telephone)

12 For Plaintiffs:

13 WILLIAM PETIT, ESQ.
MICHAEL AXLINE, ESQ.

14 For Defendants:

15 PETER LIGH, ESQ. (Vitol)
ROBERT WILSON, ESQ. (Idemitsu)
ADRIAN SANCHEZ, ESQ. (Peerless)
16 JAMES HARRIS, ESQ. (Petrobras)
DAVID SCHULTE, ESQ. (Petrobras)

17 Observing for Defendants:

18 ELAINE MALDONADO, ESQ. (Total)
ALBENIZ COURET FUENTES, ESQ. (Total)
JAMES PARDO, ESQ. (Liaison)
19 LISA GERSON, ESQ. (Liaison)

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1 THE COURT: Good afternoon. This is Judge Scheindlin.
2 Is Mr. Petit on the phone?

3 MR. PETIT: Yes, your Honor.

4 THE COURT: And Mr. Axline?

5 MR. AXLINE: Yes, your Honor.

6 THE COURT: And now I'm going to call out the names of
7 defense counsel. Mr. Ligh?

8 MR. LIGH: Yes, your Honor.

9 THE COURT: Mr. Wilson?

10 MR. WILSON: Yes, your Honor. Good afternoon.

11 THE COURT: And is it Ms. Sanchez?

12 MR. SANCHEZ: Mr. Sanchez.

13 THE COURT: Oh, Mr. Sanchez. Mr. Harris?

14 MR. HARRIS: Good afternoon.

15 THE COURT: Mr. Schulte?

16 MR. SCHULTE: Yes, your Honor. Good afternoon.

17 THE COURT: Ms. Maldonado?

18 MS. MALDONADO: Yes, your Honor.

19 THE COURT: Mr. Fuentes?

20 MR. FUENTES: Yes, your Honor. Good afternoon.

21 THE COURT: Mr. Pardo?

22 MR. PARDO: Good afternoon, your Honor.

23 THE COURT: And Ms. Gerson.

24 MS. GERSON: Yes, your Honor.

25 THE COURT: Okay. I have two letters that I have

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1 looked at. They're both dated December 18th. And I have one
2 from defense counsel, Mr. Harris, and then I have one from
3 Mr. Petit for the plaintiff. So I've read both these letters,
4 and there must be some middle ground because if you read the
5 plaintiff's letter, they basically present a list of horrors,
6 saying that it would result in many, many complex motions,
7 which no other defendants are being allowed to make at this
8 time.

9 Do you know what that disturbance is? I can't think
10 straight. What is that noise on this call? Does anybody know?
11 I'm sorry. We can't do it. We can't do the call. We can't do
12 the call unless -- hello?

13 MR. PETIT: Your Honor, this is Will Petit. I think
14 that was Mr. Sanchez's line. He was the last to get on and
15 that's when we started hearing it. He's in Peru, your Honor.

16 THE COURT: Oh, okay.

17 MR. SANCHEZ: Sorry.

18 THE COURT: Okay. Now I can continue, but it says
19 basically that there would be endless enormous motions that
20 would -- I think the phrase was shut down the court for years,
21 although I for some reason can't find that phrase right now.
22 Here it is. It says, "Quite apart from the impossible
23 discovery timeline, the logistical nightmare such an approach
24 would create, or the prejudice to the Commonwealth and even the
25 other defendants, filing summary judgment motions on that many

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1 sites would clog the Court's calendar for years." Now
2 obviously my goal was not to have summary judgment motions on
3 400 sites. I didn't think we were talking about discovery on
4 400 sites. Because that's not the way we've been doing this
5 case at all. Do the reinstated defendants anticipate
6 site-specific discovery on 400 sites?

7 MR. HARRIS: Your Honor, this is Jim Harris. May I
8 respond?

9 THE COURT: Please.

10 MR. HARRIS: The answer is no, your Honor, and we were
11 not anticipating any summary judgments on causation. What we
12 had hoped to get from the plaintiffs -- and given the amount of
13 time that's passed in this case, we thought it was not an
14 unreasonable request -- was an identification of those sites
15 that they believe we are connected to, and at this point we're
16 not going to challenge that. We just want to know what sites
17 are we connected to and as to those sites, tell us when you
18 discovered MTBE. And it would be just as to the reinstated
19 defendants, not as to any other defendants. I guess we'd take
20 up that issue, your Honor, in Phase 2. It's just I think a
21 recognition that we are in a different position than the other
22 defendants given that we were brought in late and that we had
23 been dismissed and were brought back into the case.

24 THE COURT: Right. But I think the point of
25 plaintiff's counsel is that the other defendants are not

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1 getting any so-called Phase 2 discovery. In other words, we
2 did discovery on the Phase 1 sites, we had motions, and we're
3 going to have a remand for trial. I guess their view is, why
4 are you sort of getting ahead of the other Phase 2 defendants?

5 MR. HARRIS: And if I might respond again, your Honor.
6 Because we're in a different position both temporally when we
7 were brought in, the fact that we were out, that at least based
8 on some discovery that Idemitsu did early on that was answered
9 by the plaintiffs, the plaintiffs were able to identify I think
10 just 16 sites to which they connected Idemitsu, which as many
11 as 10 I think are out that the plaintiff, in those answers to
12 interrogatories, say that MTBE was not at those sites before
13 2006. And if the plaintiffs could do that with respect to
14 Idemitsu, we felt that they certainly could do it with respect
15 to the three other defendants who have a very narrow focus on
16 limitations. And additionally, we have a laches argument, your
17 Honor, that none of the other defendants have.

18 THE COURT: Right.

19 MR. HARRIS: We're just tagalong defendants, anyway.
20 We're just in an entirely different posture.

21 THE COURT: No, I agree, I agree, and I am leaning
22 toward the defendant's position on this, but I wanted to
23 understand whether the plaintiff's letter is a realistic parade
24 of horrors. I mean, obviously I'm not planning to have full
25 site-specific discovery on 400 sites, full discovery, you know,

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1 what substances are found and what the hydrogeologists say and
2 all of that, and we're not doing site-specific discovery in
3 full on those sites. And the plaintiff's letter would say,
4 well, it's not fair even to the other defendants for these
5 defendants to have site-specific discovery on 400 sites. But
6 you've answered that. You said there's no way it's going to be
7 400 sites. They should identify, as to Vitol, Peerless, and
8 Petrobras, which sites we are talking about, and then the only
9 question you'll want to know, or they'll want to know, or
10 you'll want to know is, when is it alleged to have been known.
11 That's it. So you're not going to find out about other
12 contaminants or you're not going to have hydrogeologist experts
13 and you're not going to be interested in direction of flow and
14 all that kind of stuff. It's really as simple as, where do you
15 think we are, where have you identified we are, and when did
16 you know.

17 MR. HARRIS: That's correct, your Honor.

18 THE COURT: I don't think that's as burdensome as
19 Mr. Petit's letter makes it sound. I think it was a "scare the
20 judge" letter.

21 So, Mr. Petit.

22 MR. PETIT: Your Honor, if I may respond. This is
23 Will Petit.

24 THE COURT: Yes.

25 MR. PETIT: In our conversations with Mr. Harris, it

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1 was a statute of limitations motion on a site-specific basis.

2 THE COURT: Yes, but what's the realistic number of
3 sites? In other words, if you sit down and give the kind of
4 list you gave to Idemitsu and it turns out that you say that
5 Vitol is at five sites or Peerless is at ten sites, I mean,
6 we're not talking 400. We're talking a limited number of
7 sites, probably not a big number, and then they'll want
8 interrogatories or document requests or admissions that talk
9 about when you knew what. Then they may be ready to make a
10 summary judgment motion based on limitations or laches. I
11 think that's --

12 MR. PETIT: And your Honor, I just think that that
13 particular discovery is also premature, and I'll give you an
14 example. Idemitsu issued us before the statute of limitations
15 very general discovery, and it was in Phase 1, and we responded
16 to that discovery by objecting that this wasn't limited to the
17 trial sites. But we gave them, based on initial information,
18 what we thought were the sites they were connected to.

19 THE COURT: Well, good. Do that for these defendants.

20 MR. PETIT: Well, for purposes of Idemitsu, it's a
21 little bit easier scenario than it is, for example, for Vitol
22 and Petrobras, and I'll give an example. (Unintelligible) and
23 409 million gallons of MTBE gases were provided to a number of
24 different parties on the island, one of which is
25 (unintelligible) but also others. Huge discovery question.

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1 Those are questions for discovery that we're going to want to
2 take against them and against other parties in Phase 2. So for
3 us to be able to tell Vitol where their gasoline landed is
4 premature. I don't think we can make that determination as we
5 could for Idemitsu. The reason why we could for Idemitsu just
6 preliminarily was because Idemitsu was a supplier to GPR in
7 each location by themselves. They kind of had a dedicated
8 supply chain. That's not the case for either Vitol,
9 Petrobras -- Peerless, which is a terminal operator, their
10 gasoline went to various places throughout the island, and we
11 haven't had a chance to conduct that discovery, and according
12 to Mr. Harris, they believe that this is a one-way discovery
13 train.

14 THE COURT: Well, I was going to speak to that, but I
15 wanted to focus on the second page of the defendant's letter,
16 which says, "Reinstated defendants were middlemen that sold or
17 directed gasoline from one sophisticated party to another
18 sophisticated party, most of whom in turn resold to others,
19 including retailers." And I think we've already ruled in
20 another decision on the sophisticated party issue --

21 MR. HARRIS: Right.

22 THE COURT: -- so the fact that they -- who said
23 right?

24 MR. HARRIS: Jim Harris. I'm sorry, your Honor.

25 THE COURT: So that's one point. Then they said they

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1 know of no release sites which they directly sold. I think you
2 would maybe agree with that, Mr. Petit. I'm not sure. Then
3 they say they never owned any storage tanks. And --

4 UNIDENTIFIED SPEAKER: Underground for Peerless.
5 Sorry, your Honor.

6 THE COURT: Right. I see. I know. I know. The
7 parentheses says other than Peerless, which are above-ground.
8 And there's no other gasoline that defendants directed to
9 sophisticated parties for each specific release site and for
10 each storage tank, etc. for each site.

11 So with all of that, I thought there was some merit on
12 defendant's position that they are in a different position than
13 other defendants and that they were out, they were brought back
14 in, they haven't had any initial discovery because they were
15 out, and they may be entitled to at least get started.

16 On the other hand, I certainly, reading these letters,
17 agree with the plaintiff that I'm not having full site
18 discovery on 400 sites. But I think that was put in there, as
19 I said, as a scare tactic. I don't think defendants think that
20 either. They're not asking for full discovery on 400 sites.
21 The real dispute seems to be that you're saying that these
22 were -- some of these defendants were big suppliers and it
23 would require product tracing to figure out where all their
24 gallons went.

25 MR. PETIT: Well, not just that. It's just going to

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1 require discovery on other defendants besides them. I think
2 the four bullet points that Mr. Harris identified in his
3 letter -- first, (unintelligible) There are certainly other
4 product suppliers that are in this case. (Unintelligible) They
5 would fall under those same categories.

6 The second issue is that it just reiterates the fact
7 that we would have to take discovery on other parties. If they
8 were limited to a group of stations, I think that that would be
9 an easy thing, an easier thing. Peerless, for example, if you
10 were limited to stations --

11 THE COURT: I'm sorry. I couldn't make you out
12 because of the disturbance on the line again. If they were
13 limited to what?

14 MR. PETIT: If they were limited to particular
15 stations more readily, like if they were owners and operators,
16 I think we would be able to have that analysis more easily.

17 THE COURT: But they're not. They're not owners and
18 operators, right? They're middlemen. They're suppliers.

19 MR. PETIT: We don't necessarily agree. I don't want
20 to appear we're agreeing. The fact that they are product
21 suppliers means that there's other discovery involved with
22 other defendants.

23 MR. HARRIS: Your Honor, Jim Harris. If I may
24 respond. What you quoted in the letter accurately
25 characterizes this. We directed materials to ports of Puerto

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1 Rico. It goes off the ship, no longer ours, it goes to others
2 that resell to the retail operators in Puerto Rico. And the
3 plaintiffs have had going on nine years now in an effort to
4 identify them. We were brought in late. I don't think it's
5 unreasonable to say, just tell us which sites we're connected
6 to. I guess if they say all 400 sites, that puts us in a
7 different position, but at this point we don't have a response
8 to what sites are we connected to. We're not going to take
9 issue with it to say we're connected to that site. But also,
10 if we're connected to a site, what the date was that you
11 discovered. I think those are simple requests that may allow
12 these reinstated defendants to get out of all or most of the
13 case.

14 THE COURT: The only thing is, they're saying, we
15 can't answer it so directly, we don't know which sites until we
16 do product tracing, because if you sold to another party who
17 then sold to the retailer, they have to trace where that
18 defendant sold before they can tell you where they think you're
19 responsible. That's why Mr. Petit says it would require
20 discovery from other defendants.

21 MR. PETIT: Your Honor, even if we were able to
22 provide the information that Mr. Harris is requesting on this
23 call, if we were to provide that and provide him a list, I
24 don't think they're going to necessarily agree with when the
25 Commonwealth says it knew of the contamination. If we're in

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1 Phase 2 --

2 THE COURT: Well, it may get us to a denial of summary
3 judgment if there's a disputed issue of fact that people can
4 point to as to when the Commonwealth knew, but to do that, you
5 have to have some evidence to prove the issue of fact in
6 dispute. You can't just say --

7 MR. PETIT: Can we make a determination on when the
8 Commonwealth knew of MTBE contamination. (Unintelligible)
9 We're certainly going to want to take discovery on what the
10 site files say.

11 THE COURT: I'm sorry. I couldn't hear that. You
12 want to take discovery as to what?

13 MR. PETIT: As to what their site files say. It's
14 more of a complicated issue than Mr. Harris, the reinstated
15 defendants make it out to be, and I'm not sure it gets us
16 anywhere in the long run.

17 MR. HARRIS: Your Honor, this is Jim Harris. What I
18 suggest is sort of a middle ground approach which is, let's
19 start out by taking a look at whether they can identify
20 specific sites and what the date that they claim are. There
21 may be a number of sites that immediately drop out because the
22 Commonwealth has a date prior to 2006. As to those sites where
23 the date is after 2006, it may be necessary to do some
24 additional limited discovery on how the Commonwealth came to
25 that particular date, but perhaps we cross that bridge when we

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1 come to it.

2 THE COURT: It sounds easy when you say it, but I
3 don't know if they can identify the sites at which they say
4 you're liable and commit themselves to that until they have
5 discovery of other defendants, right? That's what Mr. Petit
6 says.

7 MR. HARRIS: I guess, your Honor, but I won't know
8 until I ask, and again, it's a little bit frustrating having us
9 brought into the case late to be told even nine years into the
10 case that they still don't have enough information to do the
11 tracing. I wasn't involved --

12 THE COURT: But that's because we haven't had Phase 2
13 discovery. We've been focusing on the trial sites. So the
14 plaintiffs are in the odd position of being accused of, after
15 nine years, not having the information, but I haven't allowed
16 that discovery to go forward.

17 MR. HARRIS: They may have some discovery. Your
18 Honor, I guess the question is, what do they know now? We
19 don't even know.

20 THE COURT: Okay. But to be committed to say, here's
21 a list of the sites at which we claim you're liable but we're
22 telling you now that we're not committed to this being all of
23 them, you're going to accept that answer? If they say, we will
24 identify 15 sites but we're not committing ourselves to those
25 15, it could turn out to be 315 but right now these are the

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1 only 15 that we can identify, what would you think of that
2 answer?

3 MR. HARRIS: I would view that as moving in a positive
4 direction for my client, your Honor.

5 THE COURT: Even though it wouldn't be definitive
6 until they get discovery of other defendants.

7 MR. HARRIS: If that's the case, again, the proof will
8 be in the pudding as they're responding to the requests for
9 information.

10 THE COURT: Apparently you're not listening exactly
11 what I said. What if they say to you, here's a list of 15
12 where we definitely say you're responsible, but we're leaving
13 it open, we're not committed to that list, we're not saying it
14 won't change, and then a year or two later, they say, oh, and
15 it's 100 more sites. You don't think you would say, boy, were
16 we misled?

17 MR. HARRIS: Well --

18 MR. PETIT: One way to look at this is what position
19 would the reinstated defendants have been in had they not been
20 out of the case earlier. They wouldn't have been in a
21 different position. They wouldn't have been entitled to the
22 discovery anyway.

23 MR. HARRIS: I would disagree with that, your Honor.
24 Your order on Trammo, Peerless and Trammo, was in July '13.
25 The fact discovery ended in October of '13, and we know that

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1 they had responded to the Idemitsu request for sites and dates,
2 and if we had had the ruling that we currently have with
3 respect to needing to show the date of injury, there would have
4 been sufficient time to ask those questions and to find out
5 what the Court wanted to --

6 THE COURT: Other Phase 2 defendants who aren't in the
7 Phase 1 sites at all, have they gotten the minimum level of
8 discovery that you're asking for, the identification of sites?

9 MR. HARRIS: I don't know that they asked, your Honor.

10 THE COURT: Well, because maybe they believe the Court
11 ruled that no discovery was going forward on Phase 2 until we
12 finished Phase 1. So when you say they didn't ask, maybe they
13 were told they couldn't, and that's what Mr. Petit is saying
14 is, if you'd never been let out and you'd been there all along,
15 discovery would essentially have been stayed if you weren't in
16 Phase 1.

17 MR. HARRIS: Well, I would add, your Honor, that I
18 think the complexion of the limitations issue changed very
19 dramatically when the Court issued its decision in Peerless and
20 Trammo in July of '13. At that point it was clear that to the
21 extent you could prove knowledge of your involvement with
22 gasoline trade in Puerto Rico and a date of injury, you can get
23 out of the case at that point in time and not have to wait
24 until trial. And I would submit to the Court that in that
25 circumstance, asking those general questions such as the ones

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1 we're asking now would have been most appropriate, and I would
2 urge the Court to allow us to proceed on that basis at that
3 time.

4 THE COURT: Right. But how many defendants have been
5 able to take advantage of that?

6 MR. HARRIS: Other than -- all I know of is --

7 THE COURT: I'm sorry?

8 MR. HARRIS: I guess Idemitsu did, your Honor, and the
9 other three reinstated defendants are asking to be able to do
10 the same.

11 THE COURT: I know, but other than Idemitsu, there are
12 many defendants. Who else has had that opportunity?

13 MR. HARRIS: None that I know of, your Honor.

14 THE COURT: Right. So that's the question. Why are
15 these three defendants entitled to special treatment, so to
16 speak?

17 MR. HARRIS: Well, your Honor, if I might respond.
18 The other way to take a look at it is, is this an appropriate
19 opportunity to allow, on the very limited issue of the
20 limitations, all the defendants to have that opportunity while
21 we await the outcome of the trial of the focus sites in Puerto
22 Rico. There is going to be a significant amount of down time
23 between now and when those cases are tried, and is this an
24 opportunity, on the very limited issue of limitations, which
25 could be outcome determinative for a whole bunch of sites, to

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1 have that discovery done now, and not limited to the four
2 reinstated defendants.

3 THE COURT: Right. So Mr. Pardo, you represent as
4 liaison everyone else. How many defendants are we talking
5 about?

6 MR. PARDO: Your Honor, Jim Pardo. I don't have the
7 exact number. I'm sorry. I didn't anticipate that question.
8 I guess I should have. But I believe there must be somewhere
9 between 12 and 15 defendants, your Honor.

10 THE COURT: Including the four reinstated or
11 excluding?

12 MR. PARDO: Excluding.

13 THE COURT: Oh, my gosh. So you think it could be as
14 many as 16 to 20.

15 MR. PARDO: That's correct, your Honor.

16 THE COURT: Well --

17 MR. HARRIS: But the question, your Honor, is going to
18 be the same for that entire pool.

19 THE COURT: Right. No, I understand that. The
20 question is, how much work is that for the plaintiff? How many
21 hours, months, weeks will that take? Because I agree with you.
22 I think this is getting to be a terribly old case and it should
23 move forward even as they're awaiting the remand period, the
24 scheduling of the trial, the build-up to trial, the actual
25 trial. I mean, to stay everything for two more years or three

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1 I don't think makes any sense. I think this discovery, what
2 you call this very limited discovery, should go forward as to
3 all defendants, because I can't really justify why these four
4 differ from everybody else.

5 So seems to me the defense should get together for all
6 16 to 20 and make their requests so that it's identical for
7 each of the defendants and then enough time has to be allowed
8 for plaintiffs to produce that kind of information. But it is
9 limited to which sites and when did the Commonwealth know.
10 That's all. Not full site discovery, as I started out saying
11 earlier in this conference, just the issue of which sites and
12 when.

13 MR. PETIT: Your Honor, this is Will Petit. It sounds
14 like what you're suggesting is a conversation we'll be having
15 with defense counsel as a whole and defendant's liaison counsel
16 as part of the Phase 2.

17 THE COURT: Right. I am saying that. I'm saying it
18 should be done for everybody because once you start doing one
19 thing for one group, another thing for another group, it's
20 chaotic, and I don't see why this group is in a special
21 position. Yes, they can point back three years ago and say,
22 well, Idemitsu got its interrogatories answered and got out and
23 all that. I don't know. I don't recall how that anomaly
24 occurred, but it's one out of 20. That's history. Now I have
25 to deal with the reality today, and I don't see why that

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1 limited portion of the Phase 2 discovery shouldn't proceed. I
2 think it should proceed as to everybody because this remand and
3 trial never goes very fast. One thinks it could happen
4 tomorrow. It won't. It will be two years before that trial is
5 over.

6 MR. HARRIS: Your Honor, Jim Harris. I think we have
7 an opportunity to do that. The defendants could easily get
8 together and craft a very focused set of interrogatories and
9 make productive use of the time when a whole bunch of the
10 defendants are not involved in the trial sites in Puerto Rico.

11 THE COURT: Well, whether everybody likes it or not,
12 that's really where I am too. I think that should be done.
13 And so go ahead and have your meeting, go ahead and craft the
14 joint discovery demands. I'm sure when plaintiff sees it,
15 they'll write letters and they'll bring it up in a monthly
16 conference and all of that, but I think that's the only way to
17 proceed at this time. So it's not quite a schedule, but I
18 think that that's where you should start. Craft the demands as
19 a group for everybody and we'll take it from there, step by
20 step.

21 MR. PARDO: Your Honor, this is Jim Pardo. May I have
22 an opportunity to speak to that?

23 THE COURT: Yes.

24 MR. PARDO: Thank you. I hear you. I will take that
25 message back to the other defendants who are not newly added

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1 here or newly added back in. I guess I'd like -- I didn't
2 anticipate this directive. I do appreciate it. I understand
3 it. I may have some folks on my side who want the opportunity
4 to be heard on this.

5 THE COURT: Well, I don't know how a defendant can
6 oppose being given the right to get discovery. So anybody who
7 doesn't want it can drop out of the group for that purpose and
8 say, this is on behalf of everybody except Shell or except
9 Exxon. If that's what you want, fine with me. But basically
10 I'm saying it goes forward as to everybody. If somebody
11 doesn't want to get discovery, that's up to them. They don't
12 have a right to be heard. That's my ruling. You're liaison
13 counsel, so they were heard through your representation. It's
14 everybody or nobody. And anybody who doesn't want any
15 discovery, fine, they can exclude themselves from the group.
16 But they won't be in a great position to ask for it later
17 either, since they decided to forgo the opportunity to get it
18 when I offered it.

19 So why don't you meet with your group, and I'm sure
20 you'll get back to me.

21 Do we have a meeting scheduled in January?

22 MR. PARDO: We do, your Honor. January 13th right
23 now.

24 THE COURT: Good. Maybe you can get the request
25 together or be heard further then. Not that I want to revisit

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1 this. This is what I think we have to do. But I'll see you
2 all then.

3 MR. PARDO: All right. Thank you, your Honor.

4 ALL COUNSEL: Thank you, your Honor.

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